M.U. and FEDERATION REPORTS.

KOK HENG CHOW v. LAY MEE YIN (f).

[Civil Jurisdiction (Evans, J.) November 12, 1947]
[Ipoh — Misc. Civil Application No. 10 of 1947]

Criminal Procedure Code, s. 360 — Order for maintenance of wife — Whether a civil or criminal matter — Right of revision — Chinese customary marriage — Proof of custom.

This was an application for revision of an order of maintenance made by the Magistrate at Ipoh. The respondent who claimed to be the wife of the applicant alleged that she was married to the applicant according to Chinese rites.

Held, (1) proceedings under s. 360 of the Criminal Procedure Code are civil in that it is a civil claim for money due from the husband by a person he is bound to support; (2) that the Court could act in revision in cases where there is no right of appeal as where the amount of the order made is less than $100.00 a month; (3) that where reliance is placed on a custom based on foreign law, it must be proved as such; (4) that in this case the marriage had not been proved and therefore the order for maintenance must be set aside.

Cases referred to :—

(1) *Ahsanullah Khan v. Mansukh Ram,* A.I.R. 1914 All. 211.
(2) *Benbow v. Benbow,* I.L.R. 24 Cal. p. 638.
(3) *In re Malcolm De Castro,* I.L.R. 13 All. 348.
(4) *Lee Seang Neoh and others v. Low Hin Tuan and others,* 5 F.M.S.L.R. 154.
(5) *Re Lee Choon Guan,* (1935) M.L.J. 78.
(6) *Raja Rama Rao v. Raja of Pittapur,* XLV Indian Appeals 148.
(7) *Mt. Sano v. Puran Singh,* (1925) A.I.R. Nag. 174.
(8) *Shanker Singh v. Emperor,* (1929) A.I.R. All 587.

CIVIL APPLICATION FOR REVISION.

S. M. Sharma for the Applicant.

Leong Yew Koh for the Respondent.

Evans, J. : — This is one of those cases in which one must guard against allowing one's sympathy to run away with one's judgment or to obscure a true view of the law. Allegations of hardship, deceit and misuse have been made, but the question to be considered is the rights of the parties and whether the respondent here had sought the proper remedy for her ill-use, real or alleged.

The matter comes before this Court for revision, and although it was not taken as a preliminary point the respondent in fact objected to that course being taken.

The respondent in the Court below claimed from the applicant maintenance as his wife under the provisions of Section 360 of the Criminal Procedure Code. The matter came before the Magistrate at Ipoh who, having heard the respondent and the applicant only, made an Order that the respondent should pay the sum of $75/- a month with effect from the 1st September this year.

The respondent claimed that she was married to the applicant on the 26th day of the first moon, that is to say, the 16th February, 1947, according to Chinese rites of the old custom in the presence of her father and the go-between. She produced a contract which appears to be a solemn document, and is admittedly signed by the applicant, although he quite irrelevantly said he did not read it. The respondent has also a grandmother living, but it does not appear that she or any of the applicant's relatives were present when the contract was signed, or that there was any other form of celebration or feasting. There is an allegation that a betrothal fee of $400/- was paid, but it is not stated by whom or to whom. She then went to live at 22 Lahat Road with the applicant for two or three days when applicant left her to return to Pangkor where he resides, apparently to the respondent's knowledge. She says that he returned to the residence he had provided for the respondent some 10 days later bringing with him an old woman. The respondent's evidence is that after staying with her for 10 days the applicant took away the old woman. It is not clear whether this means that he was during that time cohabiting with the respondent, or whether the respondent refers to the principal wife, whom the applicant is said to have, as "the old woman." The respondent alleges that before marrying applicant, he told her that his wife was dead, and she claims to have married him as his principal wife, but she says that she herself was a widow.

Mr. Yew Koh's preliminary objection was that this was not a proper subject for revision. The provisions under which the respondent was claiming are contained in the Criminal Procedure Code. It is also true that there are *dicta* in Indian cases referring to this as a criminal matter and even as punishing the husband. The distinction has, however, been discussed in English cases where perfectly clear and logical distinctions have been drawn defining such proceedings as criminal, when they may result in punishment, and as civil when brought simply for vindicating a civil

right. It is quite clear that proceedings under Section 360 are not in any sense criminal, or are brought for the purpose of punishing the husband, but are a civil claim for money due from him by a person he is bound to support. It is true that later proceedings for the same purpose may be criminal under Section 362, but these are, strictly speaking, for disobedience of the Court's order and not for the purpose of vindicating a wife's rights. If the order be obeyed there is no possibility of the proceedings leading to punishment. It has, therefore, been on many occasions a matter of some doubt as to how an appeal can be brought in these matters. Section 307, giving a right of appeal under the same Enactment, specifically refers to "a criminal case." The right of civil appeal is governed by Chapter XLV of the Civil Procedure Code, but the limit of appeal is laid down in Section 54 of the Courts Enactment. An Order under Section 360 may be for a month or may be for years. The total amount is uncertain. Elsewhere an appeal is allowed in these matters, and the judgment is one with very serious consequences to the husband. Mr. Yew Koh relied on the case of *Ahsanullah Khan v. Mansukh Ram*[1] and cited the paragraph of the judgment therein which reads :—

> The revisional jurisdiction of this Court can always be exercised in order to prevent a gross and palpable failure of justice. At the same time it should not be so exercised as to make one portion of the Code of Criminal Procedure conflict with another, as would be the case were this Court to permit the practice to grow up of invoking its interference in revision so as to give a right of appeal where such right is definitely excluded by other provisions of the Code of Criminal Procedure.

But that is certainly not the case here. The right of appeal may be in some doubt in view of the provisions referred to, but it is certainly not definitely excluded. The exclusion, if there be one, is extremely indefinite and vague. The section conferring the primary right is found in the Criminal Procedure Code. This matter is dealt with here in a civil Court, and where a claim is not appealable by reason of the amount of the judgment being less than $100/- revision has always been freely used if there seems to be any possibility, not only of a gross and palpable failure of justice, but of clear mis-application of the law. In this case the amount of the Order is $75/- a month, and it is almost certain that its total amount must vastly exceed $100/-. I cannot think that allowing revision in this case is in any way contrary to the spirit of the provision.

Mr. Sharma for the applicant himself took an objection to the jurisdiction of the Ipoh Magistrate. He relied on the case of *Benbow v. Benbow*[2], the head note of which reads :—

> If a person neglects or refuses to maintain his wife, the proper Court to take cognizance of the complaint of the wife is the Court within the jurisdiction of which the husband resides.

He says that in this case the proceedings should have been brought in the Dindings Court.

Mr. Yew Koh, in reply, referred to *In re Malcolm De Castro*[3] where a woman, who found her husband living with another woman, was allowed to bring her proceedings in the district where she then took up her residence. That case, however, was specifically referred to in the case stated by the Magistrate for the decision of the High Court in *Benbow v. Benbow*. The Magistrate gave his reasons for rejecting it. With that view the High Court agreed :—

> It seems to us that, if the principle which underlies Section 177 of the Code (Section 121 of our Code) may be applied to this case, the complaint should be enquired into by the Court within the local limits of whose jurisdiction the husband neglected or refused to maintain his wife.

In this case the applicant does not deny that a room in 22 Lahat Road was rented by him and although Mr. Sharma argued that it was a wife's duty to follow her husband, there is no evidence whatever that she was ever called on to do so, and the applicant ordinarily described her as his mistress. There is, therefore, no doubt that, if she be a wife, she was deserted or neglected in Ipoh. The fact that proceedings may be properly maintainable in one Court does not necessarily imply that they cannot be brought in a second. It seems to me that these proceedings are quite properly brought in Ipoh.

It may be noticed that in *De Castro's* case cited above, Knox J. said :—

> The neglect to maintain a wife is an offence, inasmuch as it is an omission which is made punishable by the Code.

The learned Magistrate, in *Benbow v. Benbow*, said :—

> It is doubtful if the failure to maintain can strictly be called an 'offence', as defined by section 4, in cases where there is no order for maintenance in existence, inasmuch as there is no penalty attaching to the breach of duty.

and the High Court in its judgment seems clearly to have refrained from using the word "offence." This is in accordance with the English authorities. There are references to it elsewhere as a vagrancy offence. In England there are twin provisions. There are found the criminal, and older, provision making it a vagrancy offence to leave a wife chargeable to the parish or deserting her whereby she becomes chargeable, and the civil provision whereby the wife may obtain an order

for maintenance, the creature of a later and independent Statute.

The point of substance in this appeal is whether the learned Magistrate was right in finding that the respondent is the wife of the applicant. There was some dispute as to whether and when Mr. Sharma said that he was disputing the validity of this marriage. That, however, is not the right way of approach. It is for the plaintiff, that is to say, the respondent, to prove her case and it is not a question of when the alleged marriage was challenged but whether the defendant ever admitted it. It is quite clear that he never did, and the matter was raised early in the cross-examination, even if not some days before the trial. These claims, which come before a Magistrate, may involve questions as to the law of marriage which are not simple, but this is not to be expected. In most well organised communities such proof is simple, and in this country four Ordinances make provision for the registration of marriages. They are the Christian Marriage Enactment, the Hindu Marriages Registration Enactment, the Mohammadan Marriage and Divorce Registration Enactment, and the general Marriage Registration Enactment. All these provide that certificates of the registration shall be *prima facie* evidence of the marriage, although when the ceremony or its result is disputed further evidence may have to be given of its form and validity. It is not suggested that this marriage has ever been registered and no certificate has been produced. Had it been produced it would have been *prima facie* evidence usually acceptable, and the applicant would have disputed it at the risk of enhancing his costs.

In this case the respondent did not rely on any such simple *prima facie* evidence, but alleged a marriage which she said was valid according to Chinese rites of the old custom. How that law became applicable is not averred, admitted or found. The law administered by this Court is defined in Section 2 of the Malayan Union Order in Council under which it is constituted. It might be noted that this section makes no reference to native custom, still less to any imported custom. It certainly makes no reference to Chinese law, and such law is therefore a foreign law and must be proved as such. Foreign law, unless agreed by the parties, must be proved by calling persons learned in that law to expound it so far as it is applicable to the facts of the case. When, therefore, this claim was put forward the Court was bound to enquire what the requirements of Chinese rites of the old custom, if that be the law of China, are as to the form and validity of a marriage.

The only evidence in this case is that of the two parties one of whom alleges one law and the other another. Mr. Yew Koh argued strenuously that the Chinese law is recognised by the Courts of this country. He did not very closely define what he meant by "recognised". They are, of course, recognised as existing in fact. They are not part of the law referred to in the Order in Council, nor are they part of the law which this Court is expected to expound. Mr. Yew Koh cited two cases which, he said, are authorities for his proposition. One is of the Federated Malay States of 1925, the other of the Straits Settlements of 1935; both are prior to the Order in Council. Both also refer to the Perak Order in Council of 21st December, 1893 (No. 23 of 1893). That Order refers to Marriage and to Inferior Wives, but throws no light on the forms or the requirements for validity other than that the spouses must not be of the same "Seh." Section 12 of that Order provides for Chinese Assessors who should be used on questions thereunder. This Order is now regarded as obsolete, its provisions, such as that as to adopted sons, are ignored and it seems to be treated as repealed by virtue of Section 4 of Enactment 15/32.

The first of these two cases is that of *Lee Seang Neoh and others v. Low Hin Tuan and others*[4]. That case turns upon the construction of a will, of which one of the beneficiaries was one Chuah Swee Sim Neoh, who was described as at one time a secondary wife of the testator. She ran away from him with a Chinese doctor and had not been heard of since. The head note of the case appears to me misleading as it suggests that a certain finding was made as to this woman's legacy. As I understand the judgment, it clearly was not. The last paragraph of the judgment reads :—

> As to the destination of the legacy of Chuah Swee Sim Neoh, I leave this matter for further argument upon better evidence such as I have indicated, and after joinder of such further parties or representatives as may be necessary. Clearness will be gained by the framing of detailed issues concerning this matter.

There is therefore no decision as to this legacy and there can be no *ratio decidendi*. The *dicta* cited by Mr. Yew Koh are merely reasons why no decision can be given, in the course of which the Judge remarks that he did not know if the testator divorced her nor if the Chinese doctor had married her, and went so far as to suggest that the latter might be possible even if the testator had not divorced her. I should hesitate to

go as far as that, but the remarks have not anything to do with the decision but are merely comments as to the absence of necessary evidence on her claim.

The other case referred to is *Re Lee Choon Guan*[5]. In that case the question arose whether one Lew Ah Lui had ever been a secondary wife of the testator's son. It was contended that in order to be so she must prove (1) co-habitation, (2) intention to form a permanent union, (3) recognition, meaning, thereby, recognition by the family of the husband. It was held that she failed to discharge the *onus*. This finding alone would have concluded the case, but the Judge then went on to discuss the matter of divorce, and seems to have decided the case finally on the ground that even if there was any evidence of marriage, there was ample evidence of divorce of an equally vague nature. The head note seems to set out accurately the law as laid down by the Judge for the purposes of this case and reads :—

> To prove a Chinese secondary marriage, though no ceremony need be proved, it is necessary to prove (a) long continued cohabitation, (b) an intention to form a permanent union, (c) repute of marriage. Recognition by the husband's family is one of the strongest forms of reputation of marriage.

Evidence was given by the plaintiff that the alleged husband paid $1,000/- to her parents, that a feast for 30 persons was arranged, and that she was afterwards fetched in a decorated car to the house, taken for her by the man, and that he there raised her veil. The case, however, does not in any way support Mr. Yew Koh's contention that the Courts of this country take judicial notice of the Chinese law. There is no account of what witnesses were called or what evidence was given, but it is perfectly clear from the judgment itself that the Consul General for China in Singapore was called as an expert witness and gave evidence both on the subject of marriage and of divorce; and it was presumably on the evidence so given that the Judge summarised the Chinese law as applicable to this case.

After the adjournment Mr. Yew Koh rather changed the ground of his argument. The woman's claim seems to have been that the validity of her marriage must be decided according to some foreign law, although it was never ascertained whether that claim was based on the fact that she had a foreign domicile, that she was of foreign origin, or that, this being the case, she kept such law of origin by reason of the absence of any possible or appropriate local form of marriage. The general Marriage Registration Enactment provides no form, apparently leaving that to the discretion of the Registrar or the assertion of the parties. The Scheduled Forms seem to make the form, and the validity, apart from, in some cases, the parents' consent, both dependent on the religion of the parties. These are all ordinary questions of conflict of law as applied to marriage. Mr. Yew Koh's later ground was that the marriage was one according to custom, and that customs could be proved by previous judicial decisions. He cited two cases: *Raja Rama Rao v. Raja of Pittapur*[6] and *Mt. Sano v. Puran Singh*[7]. This last merely follows the Privy Council case. In that case, Lord Dunedin says :—

> When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading. Analogy may be found in instances in the law merchant or in certain customs in copyhold tenure.

"Custom" in England has a definite meaning, and one of its attributes is that it is confined to a limited area. The learned Lord is here speaking of "copyhold tenure" which would be limited to the manor in which it applies. Similarly, the law merchant is formed of rules derived from established and proved usage held binding on persons who make contracts in accordance with that established practice. The Indian cases appear to me to have little bearing on the matter. There is no analogy in this respect between this country and India where there are a large number of different tribes and races, and of different religions, all native to the country. In many respects a man is there said to have a personal law of his own, a phenomenon unknown here and, I believe, in most modern countries. It is true that the woman speaks of Chinese custom, and it may be that the Chinese law of marriage is based on custom, although it is difficult to believe that a single custom could have prevailed throughout China. It is possible, however, that varying customs have, in course of time, been assimilated. In such case the customs may have become the common law of China, here a foreign law. If not, the custom is the custom of a part and applicable to all its inhabitants, but of which part is not specified, nor whether such applies to both parties. This however, does not seem to me a custom in the sense in which Lord Dunedin was using the word; he is not speaking of custom of parts of foreign countries. In the case of *Lee Choon Guan*, the Consul General, although referred to as giving expert evidence, presumably regarding the law of China, in fact seems to have given further evidence of custom in Singapore. But if that differs from Chinese law, there is nothing

in this case to show that one rather than the other should apply in Perak.

In this case the only evidence given, both as to facts and the special law said to apply, was given by the parties. But it is not for the parties to invent or state the law which they say is applicable. At the very best it is not a subjective standard of what they honestly believe the law to require, which is to bind their actions, but an objective external standard of what the law actually is. And when the law properly applicable is a foreign law, such law must be proved by expert evidence, though like any other question of facts the parties may agree on it. Mr. Yew Koh, in objecting to this matter being made the subject of revision, referred to other Indian cases in which it was said that in a revisional matter a Court does not take a technical view, nor is it a question of whether the finding was acceptable to the revising Court on a balance of the evidence recorded in the trial Court. The judgment in the second case referred to, *Shanker Singh v. Emperor*[8], goes on to say:—

> The correctness of the finding, sentence or order also implies a legal defence such as the finding being based on an entire want of evidence.....

Here it is not a technical matter. It is a question of the entire lack of proper evidence required to show the validity of the marriage.

In point of fact, the learned Magistrate did not rely on the cases referred to or on any custom, but on the contract produced P.1. The cases cited do not show that such a contract is general or is required to constitute a Chinese marriage or would in itself constitute a Chinese marriage. The principal case relied upon *Re Lee Choon Guan,* puts the matter on quite a different basis, and treats it almost as a matter of fact, on the existence of the practice of intercourse, its continuance, and the intention. Under the law as laid down in *Re Lee Choon Guan,* it would be quite impossible to prove a secondary marriage at the outset. It seems to me that the statement of the law, whencever derived, in that case cannot be exhaustive. The requirements there laid down are cumulative, and give no basis whatever for Mr. Yew Koh's contention that the matter depends on intention, and intention alone. It was held that repute or recognition was also necessary. In that case some celebrations seem to have taken place, but no importance was attached to them because they were entirely one sided. The man was not present nor any members of his family. The document on which the Magistrate relies is itself inconsistent with the law there laid down as it recites, apparently as a necessary condition for the marriage "that we have the permission of the heads of our respective families." That may well be required, but it is quite inconsistent with the theory that the matter depends on the intention of the parties alone.

Mr. Yew Koh seems to feel strongly about this matter, and contends that his client has been deceived and abused. The contract, P.1, undoubtedly appears to be designed to lead the woman to suppose that she was entering into a valid marriage. Deceit is not an alternative to marriage and does not make a wife.

It is possible that she is married, but she has not proved it. As was pointed out above these proceedings are not by way of punishment for desertion, immorality or for anything else, but a simple means by which a married woman obtains her rights. It is essential that she should prove that she is a married woman and has a married woman's rights. They are not available to any loose woman. I do not, by this, wish to reflect on the respondent, but she has not proved the very foundation on which this remedy rests. Even if she be not married, it does not follow that she is without redress. If she has been deceived and has suffered damage, there is an appropriate action. If she has been promised marriage and that promise has not been carried out, she may well have an action for its breach. In this case a contract seems certainly to have been made, and a sum of money paid to a broker, or some person who apparently makes a living in this way as a go-between, and who might not only be presumed to know the law but might be supposed to undertake to procure a valid legal result. I have no doubt that whatever this woman's position may be, she has either not chosen the right remedy or, if so, has failed to prove the very foundation of her case. The appeal must, therefore, be allowed. I do not send the matter back to the Magistrate because she can always renew her application, if well advised to do so.

Appeal Allowed.

RATNASAMY v. PUBLIC PROSECUTOR.

[App. Cr. Juris. (Laville, J.) March 25, 1948]
[J.B.—Cr. App. No. 2 of 1948]

Excise Enactment, Johore, (No. 102) s. 55—Jurisdiction—Courts Ordinance, 1946, s. 18 and Sched. 4.

When a section lays down that "all prosecutions under this Enactment may be had before the Court of a Magistrate of the first class; and such Court may impose any penalty provided by this Enactment anything